Green Procurement in Trade Policy

Background report
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for

The Commission for Environmental Cooperation

The Commission for Environmental Cooperation (CEC) was established under the North American Agreement on Environmental Cooperation (NAAEC) to address environmental issues in North America from a continental perspective, with a particular focus on those arising in the context of liberalized trade.

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Executive Summary

As interest and consumer demand grows for “green” products, and as producers realize increased market share in food products and consumer goods, public procurement, covering all federal and sub-central purchasing of countries throughout the world, is becoming an increasingly important market force. Just one web service, the Recycling Data Network Information Services, lists a recycled-content products database of over 4,500 listings in 700 product classifications. The US government alone purchases more than $200 billion worth of products and services annually and provides an additional $240 billion to grantees that, in turn, buy products and services. Sub-central and local markets are equally valuable in aggregate terms.

The environmentally preferable procurement market is also becoming increasingly sophisticated. This includes preferences based on product attributes—ranging from energy efficiency to the amount of air, soil, and water pollution generated while making the product and waste disposal, recycled content resource use, transportation and durability. Many of these attributes are process-, rather than product-based, and are evaluated by one or more of the many private-sector and government-sponsored programs that evaluate and certify products for their “green” characteristics.

This report explores whether there are possible barriers to “green” procurement arising from the international agreements that discipline trade in goods and services: the Uruguay Round Agreements, the North American Free Trade Agreement (NAFTA) and the Free Trade Area of the Americas (FTAA), which is in the process of negotiation. It describes the important operational provisions of the World Trade Organization (WTO) Government Procurement Agreement (GPA) and the NAFTA Chapter 10 Agreement on Public Procurement, and explores the likely limits of the FTAA procurement agreement. It also describes the standards disciplines relevant to defining “green” products, and procurement policies and practices relating to food.

The conclusion is that there are no serious barriers to “green” procurement in these agreements, although standards disciplines could be used in some circumstances to challenge standards pertaining to particularly controversial products, such as transgenic maize (corn). This would most likely happen, not in the context of procurement *per se*, but rather in situations where particular standards could be determined to effectively prevent or deny market access, whether they are the subject of procurement or not. This report also notes that standards equivalence will be a growing challenge as ecolabels proliferate and green buying programs become broader and more widely used.

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Section 1: Introduction

Since an Executive Order signed by President Clinton in 1997 mandated the use of "green procurement" in US government agencies, the emerging trade policy issues surrounding it have remained somewhat clouded, even as the United States and its hemispheric partners have embarked on an ambitious series of trade liberalization agreements, and as the number of "green" products and initiatives in the marketplace have increased tenfold. Parallel developments are underway globally, in Europe, Asia and Latin America.

This report describes the existing international trade obligations affecting government procurement at federal and sub-central levels, analyzes proposed rules and the negotiating positions in the three major agreements affecting the Western Hemisphere that relate to green products, and describes the disciplines governing what defines a "green" product. It then analyzes procurement issues raised by local purchase requirements and two kinds of products (non-transgenic maize and organic coffee).

Finally, the report concludes that the WTO's Agreement on Government Procurement (GPA), while more extensive than its predecessor, is unlikely to pose a problem for "green" procurement. In fact, it could even provide a substantial advantage in GPA member countries for products that meet "green" criteria. However, in some cases WTO standards obligations may be as important as the procurement agreement for "green" procurement. The same holds true for NAFTA and the FTAA.

Section 2: The International Agreements

2.1 Some background on public procurement

Public procurement has been a political and economic force shaping the way government responds to its citizenry since pre-Roman times. Purchases for military and for other purposes have greatly influenced public and military policy and history. Every important economic and political concept, including slavery, has at one time or another passed through the lens of public procurement policy, which has historically been used to reward friends, damage enemies, influence social issues and generally contribute to the public welfare. Much public procurement law remained uncodified until very recently.

Today, the officially stated general purpose of public procurement is to serve the best interests of government by acquiring goods and services on the most advantageous terms, considering price and other factors deemed to be important to the purchasing agency. Public procurement law accordingly sets out a legal framework for this, and also gives potential purchasers assurances of transparency, due process and equal opportunities for bidding in a procurement process that is articulated in government regulation.

National and subnational priorities are very apparent in government procurement law and regulation. In the United States, for instance, such priority is given to purchases of goods and services from small business, from minority-owned business, and for "green" products. The "Buy America Act" also governs many kinds of procurement. In the European Union, concurrent directives requiring devolution and direction to purchase environmentally preferable products have encouraged "green" procurement on many sub-central levels.

2.2 Existing international instruments – The GPA, NAFTA and the FTAA

The most relevant international instruments affecting procurement of "green" products are the WTO agreements. Neither the General Agreement on Tariffs and Trade (GATT) nor the WTO agreements specifically cover public procurement in their general provisions. In fact, public procurement is specifically exempted from the market access commitments negotiated in the Uruguay round. However, the WTO's Government Procurement Agreement applies directly and other WTO agreements, including the Sanitary and Phytosanitary Agreement (SPS), and the Agreement on Technical Barriers to Trade (TBT), are relevant to *definitional* aspects of green procurement.

2.2.1 The GPA

The WTO's Government Procurement Agreement (GPA) is the predominant international instrument disciplining government procurement. It was first negotiated during the Tokyo Round, entering into force on 1 January 1981, then renegotiated in the Uruguay Round, which expanded its coverage. It is intended to increase global access to the internal procurement processes and practices of each signatory country, pursuant to rules providing that these processes and practices must be conducted in ways that are 1) transparent, 2) subject to due process, and 3) do not discriminate against foreign goods and services.

The GPA is very different from other WTO agreements in that it only applies to those WTO members who elect to become GPA signatories. This means that, at present, it applies to only 25 countries. It has two kinds of obligations; general rules, most of which concern tendering procedures, and coverage of specific entities that are individually described in the agreement.

Among GPA members, the GPA extends basic WTO disciplines—national treatment and most-favored nation treatment—to those procuring entities that it covers. It also prohibits discrimination against locally-based suppliers in favor of foreign affiliation and ownership or country of production of goods or services provided (if the country is a GPA member). These are among the most important WTO disciplines, and they are only applied to procurement contracts covered by the GPA since procurement is otherwise excluded from those WTO and GATT obligations.

The GPA only applies to the procuring entities specified by each country in the "schedule" of goods and services listed in the agreement and, further, it applies only to procurement contracts exceeding a given "threshold limit." The United States uses a "negative " list to define coverage of goods and services under the GPA—meaning that it lists in its schedule the goods and services that are **not** covered by the Agreement. Other countries use a "positive list," listing entities that **are** covered.

The GPA covers two categories of procurement not covered before—services and sub-central entities—and it is much more inclusive than its predecessor, **but it does not cover food**. The reasons for not including food are thought to be historical: food was not considered suitable to be globally traded, and fungible goods would not stand up to the rigors of a full-blown procurement process – often taking 40 to 60 days to complete. However, in reality, government purchases of food take place for many different reasons: as a subsidy to local or national producers, for redistribution as aid to domestic populations unable to purchase adequate supplies of food at market prices, and as foreign assistance.

The WTO describes the last round of GPA negotiations as having "achieved a 10-fold expansion of coverage, extending international competition to include national and local government entities

whose collective purchases are worth several hundred billion dollars each year. The new agreement also extends coverage to services (including construction services), procurement at the sub-central level (for example, states, provinces, departments and prefectures), and procurement by public utilities."[1]

Unlike its predecessor, the GPA is also more explicit about the kinds of transparency, and processes and practices that it requires of signatories. New obligations require governments to implement domestic procedures allowing private bidders to challenge procurement decisions and obtain redress if awards are granted inconsistent with GPA rules.

The GPA is **not specific** regarding the substance of procurement. It allows procuring agencies to set their own standards and requirements, subject to certain general guidelines. It expresses a preference "where appropriate" for performance rather than design characteristics, and a preference for specifications based on international standards where they exist or on national technical regulations, recognized national standards or national building codes.[2] It provides that these shall not be adopted intentionally or effectively as a barrier ("unnecessary obstacle") to trade.[3] The GPA also prohibits "offsets."[4]

The agreement applies only to contracts worth more than specified threshold values. The threshold value of GPA-covered contracts is subject to definitional terms, but the WTO estimates that "for central government purchases of goods and services, the threshold is Special Drawing Rights (SDR) 130,000[5] (approximately US$178,000 in May 1997)."[6] For purchases of goods and services by sub-central government entities the threshold is about $275,000. For utilities, thresholds for goods and services are generally around $550,400, and for construction contracts the threshold is around $6,880,000."

In an effort to expand the reach and coverage of the GPA, the United States and presumably other GPA signatories do not allow bids on GPA-covered contracts from non-GPA signatories.

The Doha Development Round has brought with it an opportunity to revisit some of the provisions of the GPA. This includes both work in the GPA and that of a working group on transparency in government procurement, whose mandate is to study elements of government procurement in GPA member government practices that could be included in a future agreement on transparency. These elements appear likely to be process-, rather than substance-, related.

Work in the Doha Development Round on the GPA will likely focus on reworking the provisions of the agreement to make it more easily readable and user-friendly. It will also include an attempt

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[1] www.wto.org
[2] GPA Article VI.2
[3] idem.
[4] The use of offsets—measures to encourage local development or improve the balance-of-payments accounts by means of requiring for domestic content, licensing of technology, investment requirements, counter-trade or similar requirements—are explicitly prohibited by the GPA. However, developing countries may negotiate, at the time of their accession, conditions for the use of offsets, provided these are used only for the qualification to participate in the procurement process and not as criteria for awarding contracts (GPA Article XVI).
[5] In 1969, the IMF created the SDR as an international reserve asset, to supplement members' existing reserve assets (official holdings of gold, foreign exchange, and reserve positions in the IMF). The SDR is valued on the basis of a basket of key national currencies and serves as the unit of account of the IMF and a number of other international organizations. The current SDR/dollar rate is about US$1.00 to SDR 1.376.
[6] www.wto.org

to clarify that "green" procurement is not excluded from the "technical specifications" allowed by the agreement. Since this is a goal shared by the US government, the EU and a critical number of other countries, this work is likely to make progress.

The Doha mandate also calls for a negotiation on procurement in services within two years of the entry into force of the General Agreement on Trade in Services. This work is taking place in a working party on GATS Rules under the Council on Trade in Services, and is in an early stage.

2.2.2 NAFTA

The obligations set forth in the North American Free Trade Agreement (NAFTA) follow essentially the model provided by the GPA. NAFTA is a more detailed agreement, covering processes and practices not elaborated in the GPA, but it does not apply to many sub-central entities and, like the GPA, it does not cover food. NAFTA has only three signatories (Canada, Mexico and the United States). The average NAFTA-covered procurement contract is worth about $54,000. Legislation implementing NAFTA in the United States specifies that the agreement is not self-executing and that it cannot be used to override other federal statutes.

2.2.3 The FTAA

The intent of FTAA negotiators is to negotiate in the FTAA an extension of the NAFTA procurement agreement. This would also ideally contain enhanced disciplines for "offsets," which are agreements to grant goods or services of value to the procuring entity "offered" by the recipient of certain kinds or values of contract awards. However, coverage is unknown at this time since the negotiation is still proceeding.

2.3 Effect on "Green" Procurement of these Agreements

Overall, none of the three agreements have much effect on "green" procurement. Food is not covered, and threshold limits are high. Moreover, state and local entities are not covered in the NAFTA, will not likely be covered in the FTAA, and only some kinds of state and local procurement are covered in the GPA.[7] Overall, "green" procurement can be encouraged at federal, state and local levels and will not likely be seen to contravene any international procurement rules, but, as discussed below, WTO rules governing how "green" products are defined could pose problems for controversial products.

Section 3: Defining "Green" Products – The WTO and its Agreements

3.1 General obligations

A procurement manager who wants to purchase "green" products must be able to define those products without running into problems. Sometimes problems are created for products by the way they are defined by standards organizations. Procurement managers do not want to make standards, but sometimes they must choose between them, and they should be aware that not all standards are created equal. Standards for "green" products might include those defining products

[7] For instance, United States sub-central procurement (Annex II of the US schedule) lists several agencies of the State of Connecticut (including the Department of Administrative Services, the Department of Public Works, the Department of Transportation and Constituent Units of Higher Education), but for the State of Oregon only the Department of Administrative Services is specified. Procurement commitments are available at <http://www.wto.org./>.

made with recycled content, products that are more species-friendly, products that are more energy-saving, products that use fewer pesticides, involve less harmful effluents, or fewer toxic chemicals in the production process, or other intrinsic or extrinsic factors. Some standards define how a product is made or how it performs, and others define product characteristics. In the environmental field, many standards are provided by ecolabeling programs, some of which are connected to governments and many of which are not.

The WTO standards disciplines govern how standards are made. These are among the international trade rules relevant to the procurement process. They are not likely to pose a problem to procurement of "green" products, except when those products are controversial—such as food with or without genetically modified content—or unless a product standard effectively constitutes a barrier to market access in a broad context—including but not limited to procurement.

The following section describes international trade rules relevant to procurement under the GPA (and the NAFTA and FTAA) and also those relevant to procurement outside it (the standards disciplines). These include:

A. GATT and GPA requirements
    - Non-discrimination
    - National treatment
    - Absence of quantitative restrictions/trade barriers
    - Like product determinations
    - GPA and NAFTA technical specifications definitions
    - GATT and GPA exceptions
    - Transparency

B. Standards Disciplines
    - Use of international standards
    - Compliance with the Sanitary and Phytosanitary (SPS) Agreement
    - Compliance with the Agreement on Technical Barriers to Trade (TBT) Agreement and/or Code of Good Practice
    - Equivalence
    - Compliance with transparency obligations

3.2 GPA or NON-GPA

Whether a contract is covered by the GPA or the NAFTA is important to the way the legal obligations are arranged and to how procurement awards might be challenged. If a procurement is covered by the GPA, (a GPA- or NAFTA-specified procuring entity contracting above the GPA or NAFTA contract threshold with another GPA member) then it is **explicit** that defining a "green" product must be done consistent with the GPA and other WTO agreements (GATT 1947 and GATT 1994, and the WTO Agreement).

But even if the procurement is not covered by the GPA, there is an **implicit** obligation on the part of WTO members to adhere to those agreements. However, procurement outside the GPA would normally **not** be subject to the most important WTO rules, national treatment and MFN treatment, because procurement is specifically excluded by GATT Article III.8(a) from those obligations.[8] This effectively allows a huge amount of government procurement worldwide to take place in markets closed to foreign firms, and is the impetus behind expanding the GPA to more signatories, and more coverage.

[8] This is contingent on purchase for governmental purposes and not for resale, as is done by state trading enterprises. There is a similar provision in the GATS.

However, defining "green" products subject to a procurement scheme not covered by the GPA or the NAFTA procurement agreement **would** be subject to the general disciplines inherent in the GATT 1947 and 1994 and the SPS, TBT Agreements concerning general standards-setting and transparency. These obligations would normally arise in the context of setting technical specifications, or defining a "green" product category. This could be done by a government entity itself or by a government entity that adopts a standard set by another body. Such a standard could be a mandatory one (a "technical regulation") or a voluntary one set by a government entity or a nongovernment entity like a private sector ecolabeling scheme.

3.3 Product or process-related standards

How one defines a "green" product can differ depending on whether the product is defined in terms of its product characteristics, or in terms of the way in which it is produced. Sometimes this is not relevant. There are many products whose environmental advantages encompass both attributes, but there is a difference between the two in WTO jurisprudence that could prove troublesome in some circumstances for standards based just on a production process (discussed below). Those standards are sometimes referred-to as "non-product-related processes and production methods, npr-PPMs, or just PPMs. The PPMs issue has become controversial because traditional GATT and WTO disciplines cover products whose attributes are evident to customs inspectors. Many WTO members are concerned that trade rules encompassing PPMs will promote unrestricted use of trade barriers. The issues are being debated in the current Doha Development Round negotiations.

3.4 GATT and GPA Requirements

These are the international trade rules that apply to procurement covered under the GPA. The same rules apply to procurement under the NAFTA, and will likely also apply to procurement under the FTAA.

3.4.1 Most-favored nation (MFN) treatment

This requires each member of the agreement to treat other members in the same manner (without discriminating among them) as to concessions or levels of benefits. Both MFN treatment and national treatment are explicitly required by GPA Article III. Government procurement is explicitly excluded from the GATT 1947 and GATT 1994 agreements, except for the operations of state trading enterprises. This means that for WTO legal purposes, the GPA is the source of the national treatment and MFN obligation

3.4.2 National treatment

National treatment is essentially a requirement that countries treat "like products" from non-domestic sources "no less favorably" than domestic products. This is essentially a non-discrimination requirement, but it is based on the concept of a "like product" which may or may not include a "like process."

3.4.3 Absence of quantitative restrictions/trade barriers

This basic GATT requirement[9] is a commitment not to erect trade barriers or implement regulations that effectively constitute trade barriers. It is a measure governing both intent (giving

[9] GATT 1947 Article XI

backbone to attempts to resist protectionist policies), and effect (allowing revision of regulations that have, perhaps unintentionally, effectively precluded market access). Procurement is not exempt from this basic GATT requirement, but the GPA also has a similar requirement that "technical specifications…shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade."[10] The more specific GPA obligation would be the most relevant to GPA-covered procurement.

3.4.4 GATT/WTO and GPA treatment of "like products"

National treatment consists of non-discriminatory treatment of "like" products. Whether PPMs are covered by GATT and WTO rules concerning "like" products has been widely discussed, including in some GATT and WTO cases.[11] Those cases, and discussion in the WTO and elsewhere have not resolved the considerable confusion regarding whether current disciplines cover them or not. Any dispute as it concerns "green" products that are defined by PPMs would most likely arise in connection with the TBT Agreement, and this is discussed in more detail below. But this issue is virtually resolved in the GPA, which explicitly allows technical specifications to include

> *the characteristics of the products or services to be procured, such as quality, performance, safety, dimensions, symbols, terminology, packaging, marking and labeling* ***or the processes and methods of production*** *and requirements relating to conformity assessment procedures prescribed by the procuring entity.*[12]

These may also be included in the criteria for the award of the product, permitting, for instance, a requirement to perform an environmental impact assessment. The NAFTA definition is somewhat narrower, but it would be difficult to construe an application of the definition of technical specifications that would exclude processes and methods of production, since this is so clearly contemplated in the procurement process. This means that a procurement manager can under the GPA clearly select "green" products based on definitions or standards that are based on processes and production methods (PPMs).[13]

3.4.5 GPA technical specifications

The most important aspects of the GPA for "green" procurement are its rules for technical specifications. In effect, these rules favor "green" procurement. The GPA clearly prefers product definition to be based on performance rather than design or descriptive characteristics[14] (thus favoring many environmentally friendly products) and to be based on international standards, national regulations or recognized national standards.[15] The technical specifications must also, of course, be non-discriminatory, both in intent and in effect.

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[10] GPA Article VI.1

[11] For a discussion of how the GPA relates to the PPMs issue, see Peter Kunzlik "International Procurement Regimes and the Scope for the Inclusion of Environmental Factors in Public Procurement" (ENV/EPOC/WPNEP(2002)17). To be published in OECD, *Improving the Environmental Performance of Public Procurement* (Paris: OECD, forthcoming).

[12] GPA Article VI. 1

[13] Peter Kunzlik "International Procurement Regimes and the Scope for the Inclusion of Environmental Factors in Public Procurement" (ENV/EPOC/WPNEP(2002)17). To be published in OECD, *Improving the Environmental Performance of Public Procurement* (Paris: OECD, forthcoming).

[14] GPA Article VI 2 (a)

[15] GPA Article VI 2(b)

The GPA likewise permits consideration of the technical qualifications of the supplier of goods and services, as long as those qualifications are non-discriminatory (applicable equally to domestic and foreign suppliers) and "essential to ensure the firm's capability to fulfill the contract in question."[16] This includes assurance that supplier is able to meet technical, financial and commercial requirements. This could conceivably mean that suppliers could be required to be certified to specific criteria, such as ISO certification.[17]

Notably, the GPA also prohibits in technical specifications the *"requirement or reference to a particular trademark, or trade name, patent, design or type, specific origin, producer or supplier, unless there is no sufficiently precise or intelligible way or describing the procurement requirement and provided that words such as "or equivalent" are included in the tender documentation."*[18] This precludes reference to a particular trademark or ecolabel (since most are trademarked) but not to the description of the environmentally preferable product or process. This might appear to be a barrier to "green" procurement, but in practice, the words "or equivalent" can function as effective shorthand for trademarked descriptions of environmentally friendly products, sparing procurement managers from generating lengthy and detailed product descriptions.

3.4.6 NAFTA technical specifications

The definition of technical specifications in NAFTA is slightly different than the GPA definition, but it clearly covers "goods characteristics or their related processes and production methods." As such it would not likely exclude procurement of "green" products if they are defined by their origins, or their production methods or processes. NAFTA generally replicates the GPA in terms of its treatment of technical qualifications and trademarks.

3.5.7 GATT and GPA exceptions

Both the GATT and the GPA and also the SPS and TBT Agreements contain general exceptions – basically they are all based on GATT 1947 Article XX which conditions the availability of exceptions "necessary" to protect animal and plant life and health and "relating to " the conservation of exhaustible natural resources on the absence of arbitrary and unjustifiable discrimination or a disguised restriction on international trade.[19] Article XX has been central to all of the GATT and WTO disputes involving environmental measures, which has led to WTO jurisprudence further conditioning availability of these exceptions to particular circumstances. [20]

The NAFTA procurement agreement explicitly incorporates the Article XX exception, stating in part that "…nothing in this Chapter shall be construed to prevent any Party from adopting or maintaining measures:…necessary to protect human, animal or plant life or health."[21] The exception is also applied in the general NAFTA text to the Chapter Two (Trade in Goods) and Chapter Three (Technical Barriers to Trade) obligations where it specifies that "The Parties understand that the measures referred to in Article XX(b) include environmental measures

[16] GPA Article VIII (a).
[17] However, this element of a technical specification would still be subject to the standards (SPS and TBT) disciplines.
[18] CPA Article VI 3
[19] GATT 1947 Article XX (b) and (g)
[20] See, for instance, the Appellate Body Report in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/RW, 15 June 2001.
[21] NAFTA Chapter 10, Article 1018.2

necessary to protect human, animal or plant life or health, and that GATT Article XX(g) applies to measures relating to the conservation of living and non-living exhaustible natural resources."[22]

The relevance of Article XX disciplines to procurement is marginal, since it is most useful in defense of a WTO challenge, an event that is unlikely to take place unless a procurement scheme has egregiously run afoul of expectations. There is ample latitude in the GPA and the NAFTA Chapter 10 to procure "green" goods without having to resort to Article XX defenses.

3.4.8 Transparency

Most of the requirements of the GPA and the NAFTA are procedural ones that emphasize the transparency, or openness of the procedures. The effort to codify procurement as a binding international instrument, globally, hemispherically and regionally, is primarily motivated by the assumption that procedural transparency will increase market access and reduce bribery and corruption, both of which have in the past been endemic in government purchasing. By elaborating the process in detail, governments agree to bind their purchasing agents to an agreed set of procedures where as much as possible is spelled out and published, and to ensure access to markets previously unavailable to all but local bidders. The moral tone is evident; the GPA explicitly contains a requirement that "entities shall not seek or accept, in a manner which would have the effect of precluding competition, advice which may be used in the preparation of specifications for a specific procurement from a firm that may have a commercial interest in the procurement."[23] Both the NAFTA and the GPA will likely add further levels of detail in future negotiations, particularly in relation to specific procurement processes.

3.5 The Standards Disciplines

The standards disciplines are important to procurement, not because procurement managers make standards, but because they base purchasing decisions on standards. If these decisions are controversial, the standards used to define the products can be challenged rather than the procurement process itself.

Ecolabels and other standards for "green" procurement are held to specific disciplines in international trade disciplines. Some products that might be the subject of "green" procurement give rise to controversy between different groups of producers, or among different social and environmental interests. But procuring these products as such is not likely to be challenged. The GATT and the TBT Agreement both exclude procurement from their coverage. Broad discretion is normally given to government procurement in terms of *what* is purchased, and the GPA and other procurement agreements generally discipline only *how* those purchases are made. Likewise, the standards agreements also discipline the way in which standards are made, rather than their substance. A formal, standards-based challenge to an ecolabeling program would not be likely, but is possible if an ecolabeling program effectively denies market access or discriminates against goods of another country.

3.5.1 GPA treatment of standards

The GATT, and the WTO agreements relating to standards that were negotiated in the Uruguay Round (the SPS and TBT Agreements), all contain disciplines governing how standards are created and administered, and they all share a preference for the use of international standards. For instance, the TBT Agreement specifies that international standards should be used where they are

[22] NAFTA Part Eight, Article 2101.1
[23] GPA Article VI 4

not "inappropriate or ineffective to fulfill the legitimate objective."[24] A recent WTO Appellate Body Report has underscored the validity of international standards in the TBT Agreement and the role of the international standardizing bodies responsible for making them. (An analysis of this decision is attached as Appendix 1.) In the SPS Agreement, international standards are required except where the Agreement makes an exception (such as for standards higher than international ones), and they are presumptively valid.[25]

The GPA requires, in this order, the use of

- International standards, where they exist
- National technical regulations
- Recognized national standards, and
- Building codes[26]

International standards are not defined in the GPA, but rather are covered by the SPS and TBT Agreements. Those agreements also govern national technical regulations, which are in essence mandatory regulations created by government or quasi-government entities like utilities (as opposed to standards, which are voluntary in effect). For instance, a mandatory labeling scheme for biohazards would be a technical regulation—so would a mandatory country-of-origin labeling requirement, whereas an ecolabel would normally be voluntary.

The GPA defines national technical regulations as those that "may include …packaging, marking or labeling requirements as they apply to a product, service, process or production method."[27] It defines recognized national standards as *voluntary* standards "approved by a recognized body that provides for common and repeated use…characteristics for products or services or related processes and production methods."[28]

3.5.2 SPS Standards disciplines

The Sanitary and Phytosanitary Agreement is essentially an elaboration of GATT Article XX(b), the GATT exception that allows measures "necessary to protect human, animal or plant life and health" and also requires that they not be discriminatory or a disguised restriction on international trade.[29] It further requires that sanitary and phytosanitary measures be "based on scientific principles and not maintained without sufficient scientific evidence…"[30] There are probably not many "green" products whose product characteristics would be governed by the SPS Agreement, since it exclusively refers to sanitary and phytosanitary (health-related) characteristics. But there may be a few. If international standards for these products are used, they would have to conform to the requirements of the SPS Agreement. This means that they would have to be based on science. The present controversy between the EU and other countries on several agricultural husbandry and biotechnology issues is focused on this requirement, because the SPS Agreement also allows provisional measures where relevant scientific evidence is insufficient.[31]

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[24] TBT Agreement, Article 2.4
[25] SPS Agreement, Articles 3.1 and 3.3
[26] GPA Article VI 2
[27] GPA Article VI 1
[28] GPA Article VI 2(b) fn 4
[29] This requirement is conditioned on the premise, articulated in footnote 3 to Article 5.6, that a measure is not more trade restrictive than necessary unless there is another measure reasonably available, taking into account technical and economic feasibility…
[30] SPS Agreement Article 2.2
[31] SPS Agreement Article 5.7

The SPS Agreement specifically references the international standards of particular standardizing bodies. These include for food safety, the Codex Alimentarius, for animal health and zoonoses, the International Organization for Epizootics, and for plant health, the International Plant Protection Convention. It also references "for matters not covered by the above organizations, appropriate standards, guidelines and recommendations promulgated by "other international organizations open to all [WTO] members, as identified by the [SPS] Committee."[32]

If an environmental standard relates to a sanitary or phytosanitary requirement, but was not promulgated by a body recognized by the SPS Agreement, would it be recognized as an international standard? This question has not yet been answered in the WTO. It could arise in the procurement context if the standard for a "green" product is one that could be covered by the SPS Agreement.

The SPS Agreement arguably applies to ecolabels, and covers standards made by private sector organizations. Article 13 of the SPS agreement requires members to "take such reasonable measures as may be available to them to ensure that nongovernmental entities within their territories…comply with the relevant provisions of this Agreement," and further that "members shall ensure that they rely on the services of nongovernmental entities for implementing sanitary or phytosanitary measures only if these entities comply with the provisions of this Agreement."[33]

Compliance with the SPS Agreement by nongovernment entities, such as third party certifiers to ecolabels, would presumably be accomplished by following the risk assessment and scientific justification procedural requirements and also the extensive transparency provisions (notice and comment) in Annex B of the agreement. However, this could be a difficult prospect for nongovernmental entities. The SPS Agreement has been the subject of WTO Dispute Settlement Panels, but these provisions have not been tested in that context.

The SPS Agreement is one of the better functioning WTO agreements, in that members both notify their measures and discuss them in SPS Committee meetings. This frequently leads to dialogue that avoids WTO dispute settlement proceedings.

3.5.3 TBT standards disciplines

The WTO Agreement on Technical Barriers to Trade (TBT Agreement) explicitly exempts from its provisions "purchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies…" and makes reference to the GPA.[34] This minimizes the chance that a TBT issue will be raised by a procurement process, but it does not eliminate it. If a "green" product is controversial and the standard used to define it is arguably TBT-inconsistent (for example, if it unfairly excludes a particular kind of production process based on nationality), the standard could be challenged under the Agreement regardless of whether it is also used in a procurement process. For instance, if the EU had made its sardines standard the basis of a purchasing decision, the procurement would not have insulated the standard from a challenge in the WTO using the TBT Agreement and it might even have inspired the challenge.[35]

The Agreement covers technical regulations—mandatory requirements including packaging, labeling, and conformity assessment by governmental and nongovernmental bodies. Like the SPS Agreement it has a national treatment requirement, and further requires that measures be no "more

[32] SPS Agreement Annex A 3
[33] SPS Agreement Article 13
[34] TBT Agreement Article 1.4
[35] See Appendix 1

trade-restrictive than necessary to fulfill a legitimate objective, taking into account the risks non-fulfillment would create."[36] In essence, a measure is presumed valid if fulfilling a legitimate objective and based on relevant international standard, unless the standard is ineffective or inappropriate. Enumerated legitimate objectives include national security, prevention of deceptive practices, protection of human health or safety, animal or plant life or health, and the environment.[37]

The TBT Agreement specifically references the ISO/IEC and ISONET as standardizing bodies.[38] This is most appropriate, since ISO Guide 65 is used, together with the TBT Code of Good Practice for the Preparation, Adoption and Application of Standards (the Code), and on its own, as an international standard for creating voluntary standards. It is very similar in terms of its requirements and contains most of the transparency provisions of the Code.[39]

The TBT Code of Good Practice applies to sub-central governments. It also applies to nongovernmental standardizing bodies. It is open to acceptance by any standardizing body within the territory of a member, requiring such bodies to notify their acceptance to the ISO/IEC.[40] Like the SPS Agreement, the TBT Code of Good Practice requires national treatment, non-discrimination, use of international standards if appropriate, and that standards be based on international standards, except where they would be "ineffective or inappropriate, for instance, because of an insufficient level of protection or fundamental climatic or geographical factors or fundamental technological problems."[41]

3.5.4 Transparency in the Standards Agreements

In addition to their substantive requirements, the SPS and TBT Agreements both require procedural elements common to the standardizing process. These will not normally be the subject of concern for procurement managers, but managers should be aware that technical regulations and standards issued by governmental bodies, and even some voluntary schemes developed by nongovernment entities, such as ecolabels, are vulnerable to charges that they lack some of the more essential procedural elements of these requirements and may be challenged on these grounds. These include consultation with relevant stakeholders, publication of procedural elements of the schemes, publication of draft standards, notice of changes in the standards and opportunity to comment.

3.5.5 Equivalence and Ecolabels

If National treatment is perhaps the most important obligation in the standards agreements, the obligation to seek equivalence is a very close second. Ecolabeling programs, in particular, since many of them are private–sector-run programs not officially connected to governments, should pay particular attention to this requirement. It is becoming more important as programs proliferate and developing countries try to gain access to them for their products.

Both the SPS and the TBT Agreement place special emphasis on the requirement that members accept the equivalence of standards different than their own if they achieve the same levels of

[36] SPS Agreement Articles 4.1 and 4.2
[37] TBT Agreement, Article 2.2
[38] TBT Agreement, Annex 3 C.
[39] See comparison of ISO/IEC Guide 59:1994 (E), at WTO G/TBT/W/132
[40] TBT Agreement, Annex 3 C.
[41] TBT Agreement, Annex 3 F

protection. Article 4.1of the SPS Agreement make it an obligation for members to do so with respect to SPS measures of other members, and Article 4.2 makes it obligatory to enter into consultations on equivalence of specific measures if requested.[42] The TBT Agreement makes it obligatory that Members give "positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfill the objectives of their own regulations."[43]In addition the TBT Agreement has extensive provisions dealing with mutual recognition of conformity assessment, which is also an equivalency process.

Section 4: Procuring "green" food products, and procurement from local sources

4.1 Procurement of food

The procurement of food has largely been excluded from all of the agreements referenced above. Different considerations have historically applied to the government's role in this sector. For instance, the US government has defined its role as a purchaser mostly in terms of food and agricultural policy, and also to some extent in terms of national defense. US government purchases of food have focused on domestic and foreign food aid in part to serve the nutritional needs of these populations, but more importantly (in policy terms) to purchase and dispose of surplus commodities in order to support their prices, and provide continued income to domestic producers. Some surplus purchases have also been used to feed US military troops and to stock commissaries at below-market prices. Apart from statutes that require purchases of surplus commodities, this policy is reinforced by statutes such as the Buy America Act, which applies to food produced in the US. In the words of the European Union,

> "The *Buy America Act* (BAA), initially enacted in 1933, is the core domestic preference statute governing US procurement. It covers a number of discriminatory measures, generally termed Buy America restrictions, which apply to government-funded purchases. These take several forms: some prohibit public sector bodies from purchasing goods and services from foreign sources; some establish local content requirements, while others still extend preferential price terms to domestic suppliers. Buy America restrictions therefore not only directly reduce the opportunities for EU exports, but also discourage US bidders from using European products or services. The US industry, through the court system and legislative lobbying, ensures that Buy American preferences are enforced vigorously and maintained.
>
> The restrictions apply to government supply and construction contracts, and require Federal agencies to procure only US mined or produced unprocessed goods, and only manufactured goods with at least a 50% local content. The *Executive Order 10582 of 1954*, as amended, expands the scope of the BAA in order to allow procuring entities to set aside procurement for small businesses and firms in labour surplus areas, and to reject foreign bids either for national interest or national security reasons. As a result of the GATT (subsequently WTO) *Government Procurement Agreement* (GPA), waivers from many Buy America provisions have been foreseen for GPA Parties *(inter alia*, through the 1979 Trade Agreements Act), including for the EU. However, the actual implementation of these waivers may in some cases produce legal uncertainty and this may act as a barrier.

[42] SPS Agreement, Articles 4.1 and 2
[43] TBT Agreement, Article 2.7

> In addition, some Buy America provisions continue to significantly limit access to the US procurement market."[44]

The Buy America Act requires purchase from US sources unless price differences or other reasons, all specified in its detailed guidance on the waivers referenced above, compel outside purchase. It is replicated in numerous states and localities and in statutes applying to the purchase of other specific items, such as transportation-related equipment, steel, and electronic and telecommunications equipment.

Commodity purchases are also limited to US sources by statute. The EU reports that "Under US regulations, only US commodities may be used in food aid transactions. Legislation expressly includes opening up markets for US exports among its food aid objectives. The provision of such non-genuine food aid causes losses to commercial supplies of commodities. Several EU markets have been targeted by non-genuine US food campaigns."[45]

4.1.1 The CLOC program

Apart from food aid, most government (USDA-funded) purchases of food are for the school lunch program. These purchases have in recent years taken place under the Commodity Letter of Credit Program, by which the government grants a letter of credit to participating institutions (schools and school districts) to purchase commodities and foods from local vendors. The latitude currently given them in terms of purchasing decisions originates from the propensity of the USDA to deliver food to schools in forms that school lunch programs could not readily digest. The program is limited to US suppliers. Food purchases are also channeled by USDA through state purchasing and distribution centers, which also operate to supply food surplus constituents with US products. Both the CLOC program and the other food aid programs are highly political, receiving sustained interest from Congress and local suppliers and recipients. Congressional appropriations are frequently used to control the detailed guidance required for their administration.

4.2 US government purchase of organic coffee as a "green" product

Nothing prevents the purchase of organic coffee in procurement. Given a preference for it, most purchasing managers would willingly buy it, although it is not presently included in most programs favoring "green" procurement.

Food has often been excluded from programs involving "green" purchasing, in part because food is inherently different, and also because standards governing environmentally preferable food (as opposed to food with health or nutrition claims) are politically controversial and widely divergent. There are few truly international standards for environmentally preferable food, and national standards (for organic food, for instance) are different. Divergence in standards also poses a policing problem for food regulators and the consuming public, since for much food procured from foreign sources there is usually no policing mechanism to verify or validate claims, particularly those based on processes and production methods. However, these issues are beyond the scope of most procurement programs.

As a practical matter, procurement officials could set technical specifications for organic food based on national standards. Only if the contract was covered by the GPA or NAFTA would they need to ensure that the national programs provided for some sort of equivalence. Absent

[44] http://europa.eu.int/comm/trade/mk_access/ustbr2002.pdf, Report of the European Union on Unfair Trade Practices in the United States.
[45] idem.

certification, they would have no way of verifying whether the products conform to the specifications, but international certification programs exist (IFOAM, for instance), and could be required in technical specifications.

It is unlikely that a challenge to an organic coffee standard (as opposed to a procurement) would be launched, but depending on whose standards are being used, products such as organic coffee might be potentially vulnerable to claims that the standards set for them are either 1) national standards in the purchasing country that might disadvantage a foreign producer's ability to compete for the label, or 2) national standards in the producing country that have not achieved recognition as equivalent. These issues would likely be resolved in the SPS or TBT context by the governments involved.

Since neither the United States (except for Hawaii) nor Canada are major coffee producers, a hypothetical procurement contract for organic coffee would most likely extend from a USG procurement entity to a foreign producer, most likely not a member of the GPA (since none of the other GPA members look like coffee producers). The contract would not likely be covered by the GPA. Unless the producing country is Mexico, it would not be covered by the NAFTA, and if it is Mexican, it would be covered by the NAFTA only if above the threshold.

Organic coffee could fall under the terms of the Buy America Act (since it is also produced in Hawaii), but since quantities are very small it might be eligible for a waiver. Organic coffee that commands significant prices over and above conventionally produced coffee might not be a good candidate for public procurement because price is usually an issue, particularly for state and local governments. However, this would not rule out its eligibility for procurement under most programs.

4.3 Procurement of non-transgenic corn

Procurement of non-transgenic corn would pose many of the same issues as organic coffee (dueling standards, no internationally harmonized standards, etc.) but transgenic corn differs from organic coffee because its defining characteristics are detectable in the product. As such, technical specifications could be based on actual product content. As with organic coffee, there is no reason that non-transgenic corn would not be eligible for procurement preference. If there is demand, procuring entities would seek to satisfy it.

However, the controversy surrounding the product is presently at a level of magnitude far greater than any controversy surrounding organic coffee, and so a standards challenge could not be ruled out, even though it is hard to see in what specific context it might arise. In general, this would mean that a preference based on health claims would have to be scientifically justified, as would a preference based on environmental claims. A health claim could be based on the need to procure a substance with a lesser degree of risk with respect to allergens (although this claim could be countered by evidence that transgenic corn presents lesser risks of mycotoxins). There will soon be an international standard in the Codex Alimentarius on transgenic corn that will provide a basis for risk assessment and management decisions of national governments.

The more interesting claim, particularly in the context of NAFTA, would be based on environmental preference. This would be a very interesting case if a Mexican procurement entity covered by NAFTA were to make it, since Mexico is a center of origin for corn and a decision underlying a technical specification could be based on the requirements of the Biosafety Protocol, which is arguably a standard in this area. A counterargument is that the BSP "standard" is not scientifically based, but since the BSP allows for the use of the precautionary principle, a risk assessment would not be entirely necessary in the BSP context. This would pit a WTO standards

discipline against the BSP "standard" in a procurement context, and would be an interesting opportunity to resolve the "MEA issue" in the context of a regional agreement rather than in the WTO.

Additional problems exist for transgenic and non-transgenic corn alike because the level of contamination of non-transgenic corn is unknown in most shipments and there are at present no internationally-recognized certification and testing standards for the product. Procuring non-transgenic corn therefore creates problems that at present have no solution. As international regulatory systems evolve some of these issues may be resolved, but the area will likely continue to be controversial enough to prevent procurement preferences for the product.

4.4 Local procurement preferences as "green"

Much of the GPA and NAFTA is addressed to local procurement preferences. Both disallow offsets, formerly a prime source of local preference, and both condition discrimination among local suppliers based on affiliation or ownership by foreign entities (in essence, not allowing use of this as an exclusive basis for selecting the non-affiliated or owned local producers).[46]

However, the theme running though both agreements is that local, sub-central and national entities all usually prefer to buy locally and usually do so, with the exception of contracts above NAFTA and GPA thresholds which are subject to the procedural requirements of these agreements. This does not rule out other requirements, of course, on Federal, sub-central and local levels, and the Buy America rules are again a model for much procurement on the sub-central and local levels.

Whether "local" procurement could be re-categorized as 'green" raises some interesting issues. If use of energy in transport to purchasers of materials and supplies is a criterion, then perhaps that would qualify some of them. Also, one can presume some diminution of quality in transport or over time for fungible goods, and this would also be a legitimate subject for technical specification. However, local production on its own does not necessarily equate with "green" procurement for environmental reasons, nor would the costs elements be consistent one way or the other. This would be up to individual procurement managers to evaluate in specific instances.

The CLOC program, described above, is an example of how federal procurement programs can accomplish local purchases without needing to define them as "green." It essentially gives discretion to individual school districts to purchase local products from defined sources without federal oversight. Because it allows for exercise of discretion on the local level, it is a highly popular and very successful program, and may be a good model for other local purchase programs. Also, as bioterrorism legislation takes hold in the US and other places, local purchasing will likely be favored over foreign sourcing, in part because documentation of purchases of food and ingredients from foreign sources will be time-consuming and more expensive.

[46] GPA Article III 2(a).

Appendix 1: WTO sardines case analysis

On 26 September 2002, the WTO released an Appellate Body decision upholding a Dispute Settlement Panel Report finding that the European Communities' regulation governing the trade description of sardines is inconsistent with the WTO Agreement on Technical Barriers to Trade (TBT). As a result of this decision, the EU must now change its regulation within 18 months or risk trade damages.

The appeals body's decision was based on Article 2.4 of the TBT, which requires a country to use a relevant international standard as a basis for its regulations. The relevant international standard is Codex Standard 94, specifying nomenclature for sardines. The EU standard is a much narrower one which allows only a single species to be so labeled and works to the disadvantage of Peruvian and US exports and those of other countries.

The significance of this decision is that it underscores the importance of Codex standards to WTO TBT compliance, unless they are "inappropriate or ineffective to fulfill the legitimate objectives." The TBT text governs all labeling and packaging regulation, while the SPS text governs science-based standards, including food safety. The TBT text does not explicitly state, as does the SPS text, that SPS measures that conform to international standards are presumed to be WTO-consistent, nor does the TBT text make explicit reference to the Codex Alimentarius.

The Appellate Body clarified that it is up to the complaining party to prove that a relevant international standard exists and that it is not inappropriate or ineffective to fulfill the stated objective. This reversed the original Panel report, which put the burden of proof on the defending party. Peru therefore had to prove that the Codex regulation effectively met the objective of providing information (market transparency) to EU consumers.

The Appellate Body also retreated from a Panel finding that the EU regulation is inconsistent with Article 2.2 of the TBT agreement. That provision requires countries to use technical regulations no more trade restrictive than necessary to achieve their legitimate objectives. The Appellate Body ruled that it was not necessary to examine this claim, having found that the regulation is inconsistent with the TBT under Article 2.4. It then went further and explicitly rejected Panel report language suggesting that the EU regulation was trade-restrictive.